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year in which it makes eligible non-subscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings for use to facilitate such transmissions, whether or not it does the foregoing for all or any part of the year; except that the minimum annual fee for a Licensee electing to pay under paragraph (a)(2)(iii) of this section shall be \$5,000.

(3) *In General.* These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under paragraph (a) of this section for the same calendar year (but not any subsequent calendar year).

(e) *Continuing Obligation.* For the limited purpose of the period immediately following the License Period, and on an entirely without prejudice and non-precedential basis relative to other time periods and proceedings, if successor statutory royalty rates for Licensees for the period beginning January 1, 2005, have not been established by January 1, 2005, then Licensees shall pay to the Designated Agent, effective January 1, 2005, and continuing for the period through April 30, 2005, or until successor rates and terms are established, whichever is earlier, an interim royalty pursuant to the same rates and terms as are provided for the License Period. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within 30 days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms. If there is a period of such interim payments, Licensees shall elect the particular royalty rate categories it chooses for the interim period as described in paragraph (b) of this section, except that the election for a service that is in operation shall be made by no later than January 15, 2005.

(f) *Other royalty rates and terms.* This part 262 does not apply to persons or entities other than Licensees, or to Licensees to the extent that they make other types of transmissions beyond those set forth in paragraph (a) of this section. For transmissions other than those governed by paragraph (a) of this

section, or the use of Ephemeral Recordings to facilitate such transmissions, persons making such transmissions must pay royalties, to the extent (if at all) applicable, under 17 U.S.C. 112(e) and 114 or as prescribed by other law, regulation or agreement.

§ 262.4 Terms for making payment of royalty fees and statements of account.

(a) *Payment to designated agent.* A Licensee shall make the royalty payments due under § 262.3 to the Designated Agent.

(b) *Designation of agent and potential successor designated agents.* (1) Until such time as a new designation is made, SoundExchange, presently an unincorporated division of the Recording Industry Association of America, Inc. (“RIAA”), is designated as the Designated Agent to receive statements of account and royalty payments from Licensees due under § 262.3 and to distribute such royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 112(e) or 114(g). SoundExchange shall continue to be designated after its separate incorporation.

(2) If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by successor entities upon the fulfillment of the requirements set forth in paragraphs (b)(2)(i) and (ii) of this section.

(i) By a majority vote of the nine copyright owner representatives on the SoundExchange Board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.

(ii) By a majority vote of the nine performer representatives on the SoundExchange Board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such

representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.

(iii) The Copyright Office shall publish in the FEDERAL REGISTER within 30 days of receipt of a petition filed under paragraph (b)(2)(i) or (ii) of this section an order designating the Designated Agents named in such petitions. Nothing contained in this section shall prohibit the petitions filed under paragraphs (b)(2)(i) and (ii) of this section from naming the same successor Designated Agent.

(3) If petitions are filed under paragraphs (b)(2)(i) and (ii) of this section, then, following the actions of the Copyright Office in accordance with paragraph (b)(2)(iii) of this section:

(i) Each of the successor entities shall have all the rights and responsibilities of a Designated Agent under this part 262, except as specifically set forth in this paragraph (b)(3).

(ii) Licensees shall make their royalty payments to the successor entity named by the copyright owner representatives under paragraph (b)(2)(i) of this section (the "Receiving Agent") and shall provide statements of account on a form prepared by the Receiving Agent. Licensees shall submit a copy of each statement of account to the collective named by the performer representatives under paragraph (b)(2)(ii) of this section at the same time such statement of account is delivered to the Receiving Agent.

(iii) The Designated Agents shall agree between themselves concerning responsibility for distributing royalty payments to Copyright Owners and Performers that have not themselves authorized either Designated Agent. The Designated Agents also shall agree to a corresponding methodology for allocating royalty payments between them using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such methodology shall value all performances equally. Within 30 days after

their agreement concerning such responsibility and methodology, the Designated Agents shall inform the Register of Copyrights thereof.

(iv) With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a Designated Agent must be made no later than 30 days prior to the receipt by the Receiving Agent of that royalty payment.

(v) The Receiving Agent shall promptly allocate the royalty payments it receives between the two Designated Agents in accordance with the agreed methodology. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and the collectives named under paragraph (b)(2) of this section for each calendar year no later than 180 days following the end of each calendar year. The Designated Agents shall agree on a reasonable basis for the sharing on a pro-rata basis of any costs associated with the allocations set forth in paragraph (b)(3)(iii) of this section.

(vi) If a Designated Agent is unable to locate a Copyright Owner or Performer that the Designated Agent otherwise would be required to pay under this paragraph (b) within 3 years from the date of payment by Licensee, such Copyright Owner's or Performer's share of the payments made by Licensees may first be applied to the costs directly attributable to the administration of the royalty payments due such Copyright Owners and Performers by that Designated Agent and shall thereafter be allocated between the Designated Agents on a pro rata basis (based on distributions to entitled parties) to offset any costs permitted to be deducted by a designated agent under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State.

(c) *Monthly payments.* A Licensee shall make any payments due under § 262.3(a) by the 45th day after the end of each month for that month, except that payments due under § 262.3(a) for the period from the beginning of the License Period through the last day of the month in which these rates and terms are adopted by the Librarian of

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Congress and published in the FEDERAL REGISTER shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) *Minimum payments.* A Licensee shall make any payment due under § 262.3(d) by January 31 of the applicable calendar year, except that:

(1) Payment due under § 262.3(d) for 2003, and in the case of a Subscription Service any earlier year, shall be due 45 days after the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the FEDERAL REGISTER; and

(2) Payment for a Licensee that has not previously made eligible non-subscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) *Late payments.* A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Designated Agent after the due date. Late fees shall accrue from the due date until payment is received by the Designated Agent.

(f) *Statements of account.* For any part of the period beginning on the date these rates and terms are adopted by the Librarian of Congress and published in the FEDERAL REGISTER and ending on December 31, 2004, during which a Licensee operates a service, by 45 days after the end of each month during the period, the Licensee shall deliver to the Designated Agent a statement of account containing the information set forth in this paragraph (f) on a form prepared, and made available to Licensees, by the Designated Agent. If a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall include only the following information:

(1) Such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of

the minimum fee recouped during the month, including, as applicable, the Performances, Aggregate Tuning Hours (to the nearest minute) or Subscription Service Revenues for the month;

(2) The name, address, business title, telephone number, facsimile number, electronic mail address and other contact information of the individual or individuals to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(i) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or a corporation;

(ii) A partner or delegee, if the Licensee is a partnership; or

(iii) An officer of the corporation, if the Licensee is a corporation;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(g) *Distribution of payments.*—(1) The Designated Agent shall distribute royalty payments directly to Copyright Owners and Performers, according to 17 U.S.C. 114(g)(2); Provided that the Designated Agent shall only be responsible for making distributions to those Copyright Owners and Performers who provide the Designated Agent with such information as is necessary to identify and pay the correct recipient of such payments. The agent shall distribute royalty payments on a basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of sound recordings by Licensees;

Provided, however, Performers and Copyright Owners that authorize the Designated Agent may agree with the Designated Agent to allocate their shares of the royalty payments made by any Licensee among themselves on an alternative basis. Parties entitled to receive payments under 17 U.S.C. 114(g)(2) may agree with the Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties consistent with the percentages in 17 U.S.C. 114(g)(2).

(2) The Designated Agent shall inform the Register of Copyrights of:

(i) Its methodology for distributing royalty payments to Copyright Owners and Performers who have not themselves authorized the Designated Agent (hereinafter “nonmembers”), and any amendments thereto, within 60 days of adoption and no later than 30 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a non-member concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (g)(2)(ii) of this section, within 60 days of such disposition.

(3) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Designated Agent’s methodology for distributing royalty payments to nonmembers meets the requirements of this section.

(h) *Permitted deductions.* The Designated Agent may deduct from the payments made by Licensees under § 262.3, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that any party entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g) may agree to permit the Designated Agent to make any other deductions.

(i) *Retention of records.* Books and records of a Licensee and of the Designated Agent relating to the payment,

collection, and distribution of royalty payments shall be kept for a period of not less than 3 years.

§ 262.5 Confidential information.

(a) *Definition.* For purposes of this part, “Confidential Information” shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) *Exclusion.* Confidential Information shall not include documents or information that at the time of delivery to the Receiving Agent or a Designated Agent are public knowledge. The Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) *Use of Confidential Information.* In no event shall the Designated Agent use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that the Designated Agent may disclose to Copyright Owners and Performers Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any individual Licensee cannot readily be identified, and the Designated Agent may disclose the identities of services that have obtained licenses under 17 U.S.C. 112(e) or 114 and whether or not such services are current in their obligations to pay minimum fees and submit statements of account (so long as the Designated Agent does not disclose the amounts paid by the Licensee).

(d) *Disclosure of Confidential Information.* Except as provided in paragraph (c) of this section and as required by law, access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, who are not also employees or